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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

JOE L. FINE and WALTER F. JOHNSEY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is the prosecutor entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial will necessarily result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction?

2. Is the "clearly erroneous" standard appropriate for review of a district court's findings with respect to an alleged violation of the Double Jeopardy Clause?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

JOE L. FINE and WALTER F. JOHNSEY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of *Certiorari* issue to review the final order of the United States Court of Appeals, Fifth Circuit, No. 80-7987, entered on April 27, 1981, which affirmed the judgment of the district court of the Northern District of Alabama denying Petitioners' motion to dismiss Counts Fourteen through Nineteen on Double Jeopardy grounds in the following entitled case:

UNITED STATES OF AMERICA,	)	Plaintiff-Appellee
v.	)	
JOE L. FINE and WALTER F. JOHNSEY,	)	Defendants-Appellants

NO. 80-7981

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division.

In addition, Petitioners respectfully pray a Writ of *Certeriorari* issue to review the final order of the United

States Court of Appeals, Fifth Circuit, on, to-wit, May 26, 1981, which overruled and denied Petitioners Petition for Rehearing, or in the Alternative Rehearing *En Banc*.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is reported in *United States vs. Joe L. Fine and Walter F. Johnsey*, No. 80-7987 (5th Cir. April 27, 1981). The opinion sought to be reviewed is also contained in the Appendix at pg. A-1. The order overruling and denying the Petition for Rehearing, or in the Alternative Rehearing *En Banc*, was entered on May 26, 1981, and is set forth in the Appendix at pg. A-10. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, affirming the district court's judgment in this case was entered on April 27, 1981. Petitioners' Petition for Rehearing, or in the Alternative Rehearing *En Banc* was denied on, to-wit, May 26, 1981. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within sixty days of the Fifth Circuit's order denying a rehearing.

QUESTIONS PRESENTED

1. Is the prosecutor entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial will necessarily result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction?

2. Is the "clearly erroneous" standard appropriate for review of a district court's findings with respect to an alleged violation of the Double Jeopardy Clause?

THE CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Fifth Amendment to the United States Constitution is set forth below:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

On October 30, 1979, after a grand jury investigation lasting eighteen months, Walter F. Johnsey and Joseph L. Fine were indicted with six other defendants[1] in the United States District Court for the Northern District of Alabama in a thirty-two page, nineteen count indictment alleging, *inter alia,* violations of the "Racketeer Influenced and Corrupt Organizations Act," 18 U.S.C. § 1961 *et. seq.* (hereinafter "RICO"), the Hobbs Act, 18 U.S.C. § 1951 (a), the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343. R. 1-32. All defendants were charged in Count One of the indictment with conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity (i.e., mail fraud, bribery, wire fraud and extortion) in violation of 18 U.S.C. § 1962

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[1]The defendants named in the indictment are The Drummond Company, a large coal producer; Garry Neal Drummond, Elbert A. (Larry) Drummond and Clyde Clifton (Sappo) Black, all identified as officers of The Drummond Company; Walter F. Johnsey, a former executive vice president and chief financial officer of the Alabama Power Company; Joseph L. Fine and Eddie Hubert Gilmore, both former members of the Alabama Senate; and Jack Biddle, III, a member of the Alabama House of Representatives.

(d).[2] R. 1-18. Counts Two through Twelve charged only Garry Neal Drummond, Elbert A. (Larry) Drummond, and Clyde Clifton (Sappo) Black with mail fraud in a series of transactions with one George Jones. R. 19-25. Count Thirteen charged Mr. Johnsey, Garry Neal Drummond and Elbert A. (Larry) Drummond with the interstate transmission of communications by wire for the purpose of executing a scheme or artifice to defraud First Virginia Mortgage & Real Estate Investment Company of money or property in violation of 18 U.S.C. § 1343. R. 25-28. Count Fourteen charged Mr. Fine, alone, with using his position as a state senator to extort money from one Gerald Ingle in violation of 18 U.S.C. § 1951(a). R. 28. Counts Fifteen through Nineteen charged Mr. Johnsey and Mr. Fine, alone, with use of the United States mails for the purpose of executing a scheme or artifice to defraud the Alabama Power Company and its stockholders of Mr. Johnsey's loyal and faithful services, and for the purpose of executing a

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[2]Count One alleged that all defendants conspired to conduct the affairs of an "enterprise", consisting of all eight defendants, through a pattern of racketeering activity. R. 3. All of the transactions which form the basis of Counts Two through Nineteen of the indictment were set out in Count One as predicate acts of racketeering. In addition, Count One also charged Garry Neal Drummond, Elbert A. (Larry) Drummond, Clyde Clifton (Sappo) Black and Walter F. Johnsey with using the financial resources of The Drummond Company to bribe Joseph L. Fine, Eddie Hubert Gilmore and Jack Biddle, III, as well as other members of the Alabama legislature by the giving or promising of gifts and gratuities to such individuals, including providing prostitutes (to legislators other than the named defendants), trips and other items of value. In addition, Count One contained allegations concerning the dealings of Mr. Fine with Real Coal Sales, Inc., a coal mining company. Count One also charged The Drummond Company and Mr. Gilmore with wrongdoing in connection with loan guarantees made by the corporation for Mr. Gilmore, who operated a coal hauling business. Finally, Count One charged Garry Neal Drummond, Elbert A. (Larry) Drummond and Jack Biddle, III with wrongdoing in connection with coal royalty payments made by The Drummond Company to Mr. Biddle. The Drummond Company, Mr. Gilmore and Mr. Biddle were charged only in Count One. R. 4.

scheme or artifice to defraud the citizens of the State of Alabama of their right to have the business and affairs of the Alabama Senate conducted free from corruption and fraud, all in violation of 18 U.S.C. § 1341. R. 28-32.

All eight defendants were separately represented by counsel. Each defendant attacked the legal sufficiency of the indictment, particularly Count One, by a strenuous motion to dismiss. R. 107, 1550-1558, 1674-1680, 1995-1998, 2062-2064, 2141-2146. In addition, each defendant, including Mr. Johnsey and Mr. Fine, filed motions for severance. R. 213-214, 1562-1556. The prosecution vigorously resisted these motions.[3]

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[3]At the hearing on defendants' motions to dismiss and motions for severance, defense counsel clearly called to the attention of the court and the prosecution the fact that the instant case could not be tried as a unit, but for Count One:

> We say that Count one is due to be dismissed, and we say that as a consequence of that, the Court is to examine and to grant in the manner in which the Court feels there should be granted various motions for severance and separate counts of indictment because if Count one fails, then there is no justification in the world for putting the defendants to the unfairness of a trial together of the remaining various counts. We submit, even if Count one did not fail, that motions for severance were due to be granted, but that it would be compulsory in the event that the motions to dismiss Count one are sustained.

Tr. 21-22, April 4, 1980.

The prosecution responded:

> A complaint has been logged by Mr. Redden – I will just speak of this briefly because I think Mr. Segrest is going to address that more specifically, that it is unfair that Walter Johnsey is going to be tried with all these other persons and that some of the evidence against them may spill over and may taint him. Your Honor, we remind the Court that in *Elliott*, [*United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom, Delph v. United States*, 439 U.S. 953 (1979)] there were numerous acts of racketeering charged in furtherance of that enterprise, including murder, and the Fifth Circuit noted that it is unfortunate that one who has nothing to do with a murder is tried with others who have. But when you join the enterprise and participate in its affairs through a pattern of racketeering activity,

Trial of the entire indictment, including all eight defendants, commenced before the Honorable Frank H. McFadden, Jr., Chief Judge, United States District Court for the Northern District of Alabama, on May 5, 1980. On the morning of July 7, 1980, more than two months into the trial, defense counsel again[4] raised at length with the Court the total lack of proof of the conspiracy and the enterprise. Tr. 12,313-12,328. In response to defense counsel's arguments, the Court declared that the time had arrived to decide whether there was an enterprise or a conspiracy. Tr. 12,343-12,345. On the following day, the government proffered its evidence on the remaining allegations of the indictment. Tr. 12,381-12,390. The trial court ultimately held that the government had failed in its proof as to all defendants on Count One and ruled that Count One was due to be dismissed as to all defendants. Tr. 12,528. With respect to the government's failure of proof on Count One, the Court stated:

> The Court is of the opinion that the defendants have been subjected to unnecessary expense and burden by the indictment. Because while the Court took considerable time to deliberate on the matter, there was not any doubt about it once the Court had reviewed it. *And the evidence did not just fail, but it failed in a very significant and almost startling way in many aspects of it.* Tr. 12,802. (Emphasis supplied).[5]

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that is just such a risk that you take, and that is the risk that is prohibited by the Congress in the RICO statute.

Tr. 47, April 4, 1980.

[4]Defense counsel and the district court raised the issue of proof of the existence of the enterprise and of the conspiracy on numerous occasions throughout the course of the trial. Tr. 3865-3879; 4682-4683; 7169-7170; 8996-9005; 9024-9025; 10122-10123; 11680-11683.

[5]The prosecutors' excuse for subjecting these defendants to embarrassment, expense, and ongoing anxiety and insecurity prior to such abysmal failure is equally "startling." They do not suggest the death or absence of key witnesses, the sudden recantation of grand jury testimony, or

With the dismissal of Count One, the government's case against those defendants named only in Count One, The Drummond Company, Mr. Gilmore and Mr. Biddle, was concluded.

Following dismissal of Count One, the remaining defendants, including Mr. Johnsey and Mr. Fine, filed motions for acquittal or dismissal or, alternatively, for mistrial of the remaining counts. Tr. 12,543, 12,530-12,531; R. 840-892, 901-916, 928-939. Mr. Johnsey and Mr. Fine argued, *inter alia*, that acquittal on Counts Fourteen through Nineteen was required in the interest of justice.[6] Tr. 12,729-12,731, 12,753-12,755.

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surprise of any type in the course of trial. They simply blame it on the grand jury for returning the indictment. *E.g.*, Tr. 12,756-12,757. The Fifth Circuit dismissed the Government's contention, stating:

> The prosecutors' implication of complete divorcement from the indictment, and of a duty to enforce every indictment however unfounded, is at best inappropriate. Opinion, Appendix at pg. A-5, n. 5.

[6]The prosecution contended that mistrial and severance as opposed to acquittal in the interest of justice, was the fairest alternative. In this regard the Court asked:

> THE COURT: Well they have been put to a good deal of trouble, and the rulings of the Court turned out to be pointless, have they not?
>
> MR. HENRY: In connection with Count One, yes, sir. The trial has been long.
>
> THE COURT: And they tried their best to get it severed, and they tried their best to get it dismissed and the Court overruled it. I guess the question is how long can the prosecution keep putting them through trials?
>
> MR. HENRY: Well if it please the Court, we're not retrying them on matters which have already been presented to the Court.
>
> THE COURT: He says he and other defendants have been subjected to a whole lot of real punishment by having to stand trial on charges that turned out to be without substance and that the Court ought to exercise its general powers of supervision and say that's enough. That's what I hear them saying.
>
> Now, they have been put through a great deal without justification, have they not?
>
> MR. HENRY: Well, if it please the Court, justification was a grand jury indictment – indictment returned by the grand jury in this Court

On July 15, 1980, the district court ruled that the government had failed to adduce evidence sufficient to go to the jury on Counts Two through Twelve, and granted the motions of Garry Neal Drummond, Elbert A. (Larry) Drummond and Clyde Clifton (Sappo) Black for judgments of acquittal on those counts. Tr. 12,794-12,795. On the same date, the district court granted the motions of Garry Neal Drummond, Elbert A. (Larry) Drummond, and Mr. Johnsey for judgments of acquittal on Count Thirteen. Tr. 12,799. Concluding that no evidence had been adduced on Counts Fourteen through Nineteen, the district court declined to grant judgments of acquittal on those counts. A mistrial as to Counts Fourteen through Nineteen, as well as a severance of Count Fourteen from Counts Fifteen through Nineteen for retrial, however, were ordered by the district court. Tr. 1032-1051.

On November 6, 1980, Mr. Fine submitted a motion to dismiss Counts Fourteen through Nineteen on Double Jeopardy grounds. Mr. Johnsey, thereafter, filed a separate motion seeking dismissal of Counts Fifteen through Nineteen on identical grounds. R. 1503-1509. The district court conducted a hearing on November 24, 1980, during which it orally denied the motions. Mr. Johnsey and Mr. Fine timely filed notices of appeal from the district court's ruling.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

This case was brought in the district court under the Racketeer Influenced And Corrupt Organizations Act, 18

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which included Count One and the other counts, which included Count Fourteen, which we're now talking about.

Tr. 12,756-12,757.

U.S.C. § 1961 *et seq.*, The Hobbs Act, 18 U.S.C. § 1951 (a), the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute. 18 U.S.C. § 1343.

REASONS FOR GRANTING THE WRIT

The opinion below decides an important question of federal law which has not been, but should be, settled by this Court. Specifically, the Fifth Circuit's opinion condones the prosecution's deliberate tactic of joining wholly-unrelated offenses and defendants under the guise of RICO in order to improve the chances of conviction, when the prosecution knew that a mistrial necessarily would result from such action if a conviction was not ultimately obtained on Count One, thereby acquiring through design a second chance at conviction. While the propriety of such action has not heretofore been presented to this Court or any other federal court, petitioners respectfully submit that such action on the part of the prosecution constitutes "prosecutorial overreaching" of the type which, under the Double Jeopardy Clause, bars a second trial.

The decision below should also be reviewed because the Fifth Circuit erroneously applied the "clearly erroneous" standard in reviewing the district court's findings of fact with respect to the issue of Double Jeopardy. In this regard, the decision below was contrary to an earlier decision of the United States Court of Appeals for the Fifth Circuit, which held that the "clearly erroneous" standard is inappropriate for the review of Double Jeopardy issues. By applying the "clearly erroneous" standard, the Fifth Circuit may not have afforded the petitioners a full and complete consideration of the circumstances which resulted in the mistrial.

ARGUMENT

I. The Prosecution's Deliberate Joinder of Wholly-Unrelated Offenses and Defendants in Order to Improve the Chances of Conviction Constitutes Prosecutorial Over-Reaching Which Bars Reprosecution.

The Fifth Amendment to the United States Constitution declares in pertinent part that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ."[7] This Court has consistently held that where a trial has been terminated by declaration of a mistrial without the defendant's request or consent, the Double Jeopardy Clause bars reprosecution unless there existed a "manifest necessity" for the mistrial. *E.g. United States v. Dinitz*, 424 U.S. 600, 607 (1976); *United States v. Jorn*, 400 U.S. 470, 481 (1971). In addition, this Court has held that where a defendant moves for mistrial as a result of "prosecutorial overreaching", the defendant's mistrial request

[7]This court recently explained the policies behind and interests protected by the Double Jeopardy Clause, as follows:

> The Double Jeopard Clause of the Fifth Amendment protects a defendant in criminal proceedings against multiple punishments and repeated prosecutions for the same offense. *See United States v. Wilson*, 420 U.S. 332, 343, 95 S. Ct. 1013, 1021, 43 L.Ed. 2d 232, 241; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed. 2d 656, 664. Underlying this constitutional safeguard is a belief that "the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L.Ed. 2d 199, 204. Where, as here, a mistrial has been declared, defendants "valued right to have his trial completed by a particular tribunal" is also implicated. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L.Ed. 974, 978; *United States v. Jorn*, 400 U.S. 470, 484-485, 91 S. Ct. 547, 556-557, 27 L.Ed. 2d 543, 556 (plurality opinion); *Downum v. United States*, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L.Ed. 2d 100, 102.

United States v. Dinitz, 424 U.S. 600, 606 (1976) (footnote omitted).

does not remove the barrier to a retrial mandated by the Double Jeopardy Clause.[8] *United States v. Dinitz*, 424 U.S. 600, 607 (1976); *United States v. Jorn*, 400 U.S. 470, 485

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[8]This Court in *Dinitz* explained the distinction between mistrials declared without the defendant's consent and mistrials granted upon the defendant's request, as follows:

> The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn, supra*, at 484, S. Ct. at 557, 27 L.Ed. 2d at 556. . . . But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause—the avoidance of the anxiety, expense and delay occasioned by multiple prosecutions.
>
> . . . . In such circumstances, the defendant generally does face a "Hopson's choice" between giving up his first jury and continuing a trial tainted by prejudical, judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.
>
> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States v. Jorn, supra*, 400 U.S., at 45, 91 S. Ct. at 557, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum v. United States*, 372 U.S., at 736, 83 S. Ct., at 1034, 10 L.Ed. 2d, at 102. *See Gori v. United States*, 367 U.S., at 369, 81 S. Ct., at 1526, 6 L.Ed. 2d 905; *United States v. Jorn, supra*, 400 U.S., at 489, 91 S. Ct., at 559, 27 L.Ed. 2d at 558 (Stewart, J., dissenting); *C. F. Wade v. Hunter*, 336 U.S., at 692, 6 S. Ct., at 8, 93 L.Ed., at 979.

United States v. Dinitz, 424 U.S. at 608-611, 96 S. Ct. at 1080-1081 (footnote omitted).

(1971). The Fifth Circuit recently interpreted *Dinitz, supra* and *Jorn, supra* as follows:

> These definitive statements by the Supreme Court make it clear that under ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule — rare cases involving circumstances which are "attributable to prosecutorial ** overreaching," *Jorn, supra,* 400 U.S., at 485, 91 S. Ct., at 557, 27 L.Ed. 2d at 556. Where "prosecutorial overreaching" exists, a defendant's mistrial request does not remove the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.
>
> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. This safeguard against "prosecutorial overreaching" provided defendants by the Fifth Amendment's Double Jeopardy Clause complements the "inestimatable safeguard against the *** overzealous prosecutor" provided by jury trial.
>
> Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was "prosecutorial overreaching" is our inquiry. If "prosecutorial overreaching" is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.
>
> To find "prosecutorial overreaching," the government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction." *United States v. Dinitz, supra,* ..... U.S., at

....., 96 S. Ct., at 1080, 47 L.Ed. 2d at 374, 44 U.S. L.W., at 4312.

United States v. Kessler, 530 F.2d 1246, 1255-1256 (5th Cir. 1976) (footnotes omitted).

While the basis of Petitioners' Double Jeopardy motion has not heretofore been advanced, there can be no question but that the prosecutors' conduct in joining wholly-unrelated charges and defendants, considering the totality of the circumstances, constitutes "prosecutorial overreaching" sufficient to bar retrial of the Petitioners. The issue in the present case is not whether proper action of the prosecutor designed to improve the chances of obtaining a conviction on multiple counts in one proceeding justifies dismissal of the charges, but, rather, it is whether the prosecutor is entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial necessarily will result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction.

In the instant case, the prosecution obtained a nineteen count indictment charging in Count One a violation of RICO by all defendants through predicate crimes wholly-unrelated to one another, and charging in Counts Two through Nineteen the unrelated crimes charged as predicate acts in Count One. The indictment was based on a grand jury investigation conducted by the prosecution lasting eighteen months. The prosecutors who conducted the grand jury investigation were experienced and knew the evidence available to them to prove the allegations of the indictment. Clearly, the prosecutors knew that under the circumstances, absent the RICO count, the defendants and unrelated crimes consolidated under this indictment could not have been joined in a single indictment. Thus, the prosecution knew at the time it obtained the indictment,

and throughout the proceedings, that if a conviction was not obtained on Count One, a mistrial necessarily would result as to the remaining substantive counts, due to the inflammatory nature of the evidence presented to the jury on Count One.

In the end, the prosecutors failed to adduce sufficient evidence to prove the critical allegations of the RICO enterprise and conspiracy charged in Count One. In the trial court's own words, the evidence "did not just fail, but it failed in a very significant and almost startling way." Tr. 12,802. Thus petitioners, as well as the other defendants, became prisoners for ten and one-half weeks in an expensive, exhausting, emotionally frightening scenario orchestrated by the prosecutors' pernicious joinder of eight defendants and wholly-unrelated offenses under the guise of RICO.

In light of the prejudicial evidence that had been presented to the jury, petitioners had no choice but to move for a mistrial. This fact was acknowledged by the Fifth Circuit, which observed that "the record of inflammatory material . . . presented to the jury makes clear that the risk of continuing with that jury was so overwhelming as to effectively force a mistrial." Opinion, Appendix at pg. A-7, n. 10. The fact that the prosecution did not oppose Petitioners' motion for mistrial supplies direct evidence that the prosecution agreed with this proposition. Tr. 12,770. As a result, the prosecution knowingly undertook to improve its chances of obtaining a conviction on the unrelated crimes joined in Count One, with the intent that it would get a second chance at conviction as a result of a mistrial should it fail to bear its burden of proving the allegations of Count One. Under the totality of circumstances involved in the present case, the prosecution's actions warrant dismissal of the remaining charges.

II. The Fifth Circuit Erred in Applying an Improper Standard of Review.

The Fifth Circuit, in passing upon the Double Jeopardy issues raised by the instant case, employed the "clearly erroneous" standard of review in reviewing the district court's findings of fact.[9] While this court has not heretofore considered the proper standard of review of Double Jeopardy issues, the standard used by the Fifth Circuit is in conflict with a recent decision by the same court. In *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir. 1981), the Fifth Circuit declared:

> It is settled that findings of fact by the district court . . . will not be set aside unless clearly erroneous. *Wade v. Mayo*, 334 U.S. 672, 683-84, 68 S. Ct. 1270, 1276, 92 L.Ed. 647 (1948); *United States v. Cruise*, 581 F.2d 535, 541 (5th Cir. 1978), and cases cited therein. *See Fed.R.Civ.P.*, 52 (a); *5A Moore's Federal Practice*, ¶ 52.03[1] (2nd Ed. 1980). However, it is equally settled that conclusions of law are not binding on appellate courts and that we are free to substitute our judgment for the district courts on the law. *Horn v. C. L. Osborn Contracting Company*, 591 F.2d 318, 320 (5th Cir. 1979); *5A Moore's Federal Practice*, ¶ 52.03 [2] (2nd Ed. 1980). Mixed questions of law and fact, likewise, are not protected by the clearly erroneous rule. *9 Wright & Miller, Federal Practice and Procedure*, §2589 at 753-54 (1971); *See Backar v. Western States Producing Company*, 547 F.2d 876, 884 (5th Cir. 1977). Since violation of the double jeopardy clause is a question of law, *United States v. Nickerson*, 211 F.2d 909, 912 (2nd Cir. 1954), *we are not bound*

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[9] In this regard, the Fifth Circuit stated:

> Presented with opposing critical reviews of that drama, containing only those segments favoring each critic's evaluation, we can but look for clear evidence that the first reviewer, who was on the scene, was wrong.

Opinion, Appendix at pg. A-5.

> *by the clearly erroneous standard.* (Emphasis in text supplied).

Thus, the Fifth Circuit has ruled that the "clearly erroneous" standard is inappropriate for review of Double Jeopardy issues.

The import of this conflict is obvious. In the context of the present action, the "clearly erroneous" standard applied by the Fifth Circuit may have seriously limited the scope of review. Rather than feeling compelled to study the entire record of the ten and one-half week trial, and the twenty-four month period immediately preceding, the panel may have looked only for evidence supporting the district court's decision. Full and complete consideration of the law, and application of all facts of this case to that law, thus may well have been precluded by the standard of review employed by the Fifth Circuit.

CONCLUSION

In *Berger v. United States*, 295 U.S. 78, 88 (1935), this court declared:

> The United States attorney is the representative not only of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In the present case, the prosecution deliberately joined wholly-unrelated offenses and defendants in a single indictment without just cause in order to improve the chances of conviction, when they knew that a mistrial necessarily would result from such actions if convictions were not ultimately obtained on Count One, thereby acquiring through design a second chance at conviction. The prosecution vigorously fought all attempts directed at severance and separate trials on the basis that they possessed sufficient admissible relevant evidence to create a jury issue on the critical allegations of a RICO enterprise and conspiracy charged in Count One. However, in the end, the prosecution "failed in a very significant and almost startling way" to prove the critical allegations of Count One. As the trial court declared, "a more detailed and careful examination of the evidence prior to the indictment could have dictated that it not be brought." Tr. 29, Nov. 25, 1980. Clearly, the governments actions in this regard constitute "prosecutorial overreaching". Only through their unjustified actions were the prosecutors able to place highly inflammatory and prejudicial material before the jury – material which necessarily resulted in a mistrial after all defendants had been acquitted on the RICO count.

These defendants are now faced with defending themselves a second time, the second trial having been necessitated solely by the prosecution's unjustified desire to try together eight different defendants accused of distinctly different crimes, thereby enhancing the possibility of convicting all. Retrial of these petitioners is harassment of the very sort the Double Jeopardy Clause is designed to prevent. Therefore, retrial of Counts Fourteen through Nineteen is barred by the Double Jeopardy Clause.

In addition, the Fifth Circuit improperly employed the "clearly erroneous" standard in this case as the standard of

review. In the context of Double Jeopardy issues, application of this standard seriously limited the scope of review, and denied petitioners the full and complete consideration of all the facts of the instant case to which they are entitled.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, L. Drew Redden, attorney for Walter F. Johnsey, an individual, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 23rd day of July, 1981, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Hon. Frank Donaldson, United States Attorney, 200 Federal Court House, Birmingham, Alabama 35203.

It is further certified that all parties required to be served have been served.

This the 23rd day of July, 1981.

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